87-231

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

TERM OF COURT - OCTOBER, 1986

BOB STOVER,

Petitioner,

vs.

JOURNAL PUBLISHING CO., ALBUQUERQUE PUBLISHING CO., and THOMAS L. LANG

Respondents.

Petition for Writ of Certiorari from the New Mexico Supreme Court

PETITION FOR CERTIORARI

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PETITION FOR CERTIORARI

A. Question Presented for Review:

Whether a newspaper publisher loses the protection of the fair report privilege where the publisher locates a witness, procures his testimony and submits the witness' affidavit in a court proceeding in which it is a party, and then republishes the witness' statements in the newspaper with the knowledge of their probable falsity.

B. Parties.

The caption contains the names of all parties.

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E. Opinions:

New Mexico Court of Appeals No. 8503, New Mexico Bar Bulletin Vol. 26, No. 29, P. 94, January 29, 1987; New Mexico Supreme Court No. 16,191, unpublished; withdrawn by Order dated January 28, 1987.

F. Jurisdictional Statement:

The order on which review is sought is the New Mexico Supreme Court's Order quashing the Writ of Certiorari and withdrawing its Opinion. The Order was dated January 28, 1987. Plaintiff-Petitioner Stover filed a timely Motion for Extension of Time to file a Petition for Rehearing which the Court granted by telephone communication, and filed a timely Petition for Rehearing on February 20, 1987. The petition was denied on June 26, 1987.

The Statutory provision believed to confer jurisdiction on the United States Court of Appeals is 28 U.S.C. 1257 (3).

The Federal constitutional questions prescribed were raised at all stages of the proceeding, including the Summary Judgment proceeding, appeal to the State Court of Appeals, and Petition for Certiorari to the New Mexico Supreme Court.

G. Constitutional Provisions and Statutes in the Case Involves:

a. Constitution of the United States, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

b. Constitution of the United States, Amendment II

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

c. Constitution of the United States, Amendment XIV

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

d. Restatement (Second) of Torts, Section 611 and comment (c) thereto.

The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and com-

plete or a fair abridgement of the occurrence reported.

Comment (c)

(a) person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated. This is true whether the original publication was privileged or not. Nor may he confer the privilege upon a third person, even a member of the communications media, by making the original statement under a collusive arrangement with that person for the purpose of conferring the privilege upon him.

H. Statement of the Case.

The present case arose when the Albuquerque Journal published a news article reporting a portion of the proceedings in a libel action by Attorney William Marchiondo against the Journal and other defendants. Marchiondo v. Brown, et al., Cause No. CV-6-75-02838, District Court, Second Judicial District, County of Bernalillo, New Mexico. In the course of the Marchiondo proceedings, these Defendants procured an affidavit from Jerome Sternlieb, a convicted felon, who was protected by the federal witness program. That affidavit contained statements purportedly connecting former Albuquerque Police Chief Bob Stover and former New Mexico Governor Jerry Apodaca to known organized crime figures. To protect these two individuals (non-parties to the litigation), the Court sealed the affidavit.

Mr. Apodaca, who was then a candidate for the Democratic nomination to the U. S. Senate, sought to reveal the affidavit's allegations pertinent to him in order to rebut them. The Marchiondo trial court held a hearing upon the Journal's unopposed motion to unseal the Affidavit. The Affidavit was unsealed. Bob Stover was not present nor represented at the hearing.

The following day, the Albuquerque Journal, who as Defendant in the Marchiondo case had procured, filed and moved to unseal the affidavit, published the affidavit's contents along with photographs of Bob Stover, Jerry Apodaca and two known organized crime figures, James Vincent Napoli, Sr. and James Vincent Napoli, Jr. and statements of Defendant Thomas Lang which he made in January of that year, three months prior to the unsealing, and not made at the hearing to unseal the Affidavit.

Bob Stover brought this defamation suit seeking damages on the basis of the filing the Sternlieb affidavit, and the newspaper publication of its contents. The complaint alleged that the Journal published the defamatory article with a high degree of awareness of the probable falsity of the statements about Stover. Stover was, at the time, a candidate for the office of County Sheriff.

Defendants moved for summary judgment contending that the newspaper article reporting the affidavit was protected under the fair report privilege. For the purpose of Defendants' motion only, the trial court assumed that the Sternlieb statements, as related to Stover, were defamatory and that Defendants had "a high awareness of their probable falsity."

Following a hearing, the Court granted partial summary judgment in favor of the defendants, holding that the initial publication of the affidavit by filing it in court was absolutely privileged and that the statements of Defendant Lang in the article, and the placement of the photograph of Stover in the article were not susceptible to defamatory meaning and were constitutionally protected statements of opinion. That portion of the summary judgment order is not at issue here.

The court denied summary judgment as to the publication of the news article. The parties conceded Stover was a public figure within the meaning of New York Times Co. v. Sullivan, 376 U.S. 254 (1964). While ruling as a matter of law that the article was a fair and accurate report of the hearing to unseal the Affidavit, the trial court held that the fair report privilege "does not apply

here due to comment (c) of Section 611 Restatement, Torts 2d," which provides that a person cannot confer the fair report privilege upon himself when he "made" the original defamatory statement and then publish to others that which he stated.

The New Mexico Court of Appeals reversed. The Opinion of the Court is contained in Appendix A. The New Mexico Supreme Court granted Petitioner Stover's Petition for Certiorari and reversed the Court of Appeals' decision. Defendants-Respondents then filed a Motion for Rehearing. The New Mexico Supreme Court granted the motion and quashed its Writ of Certiorari as improvidently granted. The New Mexico Supreme Court's Opinion is included in Appendix B.

I. Argument.

This case presents an important public question concerning the balance to be struck between the Constitutional protections afforded a free press by the First Amendment and the individual's right to be free from defamatory statements. In reversing the District Court and ruling that summary judgment is appropriate in this case, the New Mexico Court of Appeals tipped the scales in favor of the media by creating an absolute privilege, and left the individual with no redress for violation of his constitutionally protected rights.

The New Mexico Supreme Court, in its original opinion, recognized the error in the Court of Appeals' opinion. It is this opinion, withdrawn on rehearing, which correctly answers the question whether the fair report privilege is absolute, or qualified and so lost if the report is made with malice. The Court decided that the comment (c) exception to Restatement (Second) Torts Section 611 should be applied to the facts of this case.

This Court has recognized the careful balance which states must strike between the individual's rights and press privileges. The Court has emphasized that it is truly a balance, and that the rights of the individual

to judicial redress of libelous utterances are as compelling as the public's interest in an uninhibited press. Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976). It has also found damages liability for publishing knowing or reckless falsehoods is consistent with the First Amendment. Herbert v. Lando, 441 U.S. 153, 171 (1979).

In this case, the New Mexico Court of Appeals has, in effect, created an absolute privilege for a newspaper to produce in-court statements with reckless disregard for their truth, and then republish the court proceedings as long as the newspaper did not file the suit itself. Such a decision is in conflict with this Court's development of the law of libel.

This Court has long recognized the limits of the press' First Amendment privileges. Even where a privilege exists, when malice is shown, the First Amendment's protections cease.

> We conclude then that malice may be proved, though alleged to have existed in the proceedings before a court, or legislative body, or any other tribune or authority, although such court, legislative body or other tribunal, may have been the appropriate authority for redressing the grievance represented to it; and that proof of express malice in any written publication, petition, or proceeding, libelous in its character, and actionable, and will subject the author and publisher thereof to all consequences of libel.

White v. Nicholls, 3 How. 266, 286 (1845) quoted in Herbert v. Lando, 441 U.S. 153 (1979) at n. 10, p. 163-164.

In Herbert, the Court rejected the contention that an absolute evidentiary privilege was required for the editorial process in order to allow the press to carry out its function without impermissible constitutional burdens, including a chilling effect on the editorial process. "But if the claimed inhibition flows from fear of damages liability for publishing knowing or reckless falsehoods, those

effects are precisely what the New York Times and other cases have held to be consistent with the First Amendment. Spreading false information in and of itself carries no First Amendment credentials. '(T) here is no constitutional value in false statements of fact.' " Herbert v. Lando, 441 U.S. at 171, citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

In Time, Inc. v. Firestone, 424 U.S. 448, 456 (1976), the United States Supreme Court considered the balance between "the public's interest in an uninhibited press and its equally compelling need for judicial redress of libelous utterances." In Firestone, Time Magazine published an article quoting a trial judge as stating that there was "enough testimony of extramarital adventures on both sides (of the Firestone divorce) . . . 'to make Dr. Freud's hair curl.' " Id., at 452. Ms. Firestone sued for libel. Time advocated a holding by the Supreme Court that as the report of a judicial proceeding, the article deserved the protection of the "actual malice" standard in New York Times Co. v. Sullivan. Id., at 453. The Court rejected Time's claim for automatic extension of the New York Times actual malice standard to all reports of judicial proceedings. Id., at 455. Time argued that the "information concerning proceedings in our Nation's courts may have such importance to all citizens as to justify extending special First Amendment protection to the press when reporting on such events." Id.

The Court rejected such a subject matter classification, specifically noting that "no such blanket privilege for reports of judicial proceedings is to be found in the Constitution." Id. at 456. Similarly, the Journal Defendants are seeking to extend New York Times beyond the malice standard enunciated in that case to absolute immunity for reporting on judicial proceedings, regardless of knowledge of truth or falsity. The concept of malice defined the parameters of the privilege to report on public figures in New York Times. See, Firestone, at 453. The Journal Defendants now seek to eliminate these standards, based on the same type of subject matter classification rejected by the Supreme Court in Firestone. Id., at 455. Rather than adopt such a subject

matter classification, the Supreme Court reaffirmed the private/public distinction, which permits a public figure to recover if he can show malice. The Journal Defendants' rule of immunity regardless of knowledge of falsehood when reporting on all judicial proceedings directly contradicts the Supreme Court in Firestone, which found that a private person could recover for libel in the reporting of judicial proceedings without even the necessity of showing malice. Further, the absolute immunity rule regardless of malice proposed by the Journal, based solely on the subject matter classification of "judicial proceedings," seriously undermines the private/public distinction the Supreme Court reaffirmed less than a decade ago in Firestone. The Journal Defendants seek to restructure the Supreme Court's theory to base distinctions in privilege entirely on subject matter, a rule the Court has specifically rejected, stating such a distinction "might achieve results directly at odds with the constitutional balance intended." Id., at 456.

The New Mexico Court of Appeals ruled that the Defendants were insulated from liability for defaming Bob Stover by the fair report privilege, even though they themselves caused the defamatory statements to become part of a judicial proceeding and then reported them to others. The fair report privilege is qualified and it offers no protection to an individual who "makes" the original defamatory publication and then reports it to others. Restatement (Second) of Torts, Section 611, comment (c). The Court of Appeals' decision too narrowly reads this exception to the fair report privilege. As a result, the Court's ruling frustrates the very public policy upon which the privilege stands, and it undermines an equally compelling policy consideration of an individual's freedom from defamation and public ridicule.

The Court concluded first that because Sternlieb actually signed the affidavit, the Defendants did not make the original defamatory statements; thus, the court determined the exception to the fair report privilege did not apply. This is an overly restrictive interpretation of the exception and ignores significant factors unique to this case. It should be noted that the trial judge ordered dis-

covery cease and therefore all evidence tending to establish or disprove "collusive arrangement" as contemplated by comment (c), Section 611, has not been developed or explored by the parties.

Here, the Defendant or their agents located Sternlieb, procured his statements, composed the affidavit for his signature, filed it in court, and moved to have it unsealed. Neither Sternlieb nor his affidavit were used by the media defendant in its litigation, although he was called by Marchiondo, that the trial judge disallowed costs pertaining to the affidavit and deposition of Sternlieb by the Journal. In effect, the Defendants were solely responsible for the affidavit's creation and making it part of the judicial proceedings. The picayune difference between making a statement in court known to be probably false and submitting a witness' affidavit in support of one's case knowing that it is probably false is too narrow to limit the fair report privilege in one instance and not in another.

The distinction, too, is incongruent with the plain meaning of the verb "to make" which includes "to cause to exist, occur, or appear." Webster's New Collegiate Dictionary (1980). Clearly, the Defendants themselves caused the defamatory statements to exist, to occur, and to appear in the record of an official proceeding. As the New Mexico Supreme Court recognized in its opinion, the relationship between Sternlieb and the Journal's agents in the preparation and editing of the affidavit indicate that material issues of fact remain.

The Court of Appeals concluded second that the Defendants did not abuse the fair report privilege and therefore they were entitled to its protection. The Court's discussion implied that it would recognize only one sort of abuse of the privilege in order to evoke the self-reported exception: the case where a person initiates a public proceeding for the very purpose of defaming a certain individual. The status of the media as a defendant rather than a plaintiff should not diminish the obligations of the media as such or as a litigant. Malicious misuse of governmental process is only one and not the sole instance

of abuse which would strip a person of the privilege's protections.

The Defendants here clearly abused the privilege. They enter Sternlieb's affidavit into a court proceeding in support of their own subjective cause, even when they were aware of its probable falsity and defamatory character. Later, they donned the role of objective reporter, published the affidavit's contents, thereby lending credibility to the incredible allegations. The very overlap and confusion between the Defendants' litigant and reporter roles present an abusive factor ignored by the appellate court.

In dicta, the appellate court determined that application of the self-reported exception in this case would undermine the privilege's purpose of insuring open reporting of official conduct. The court's conclusion is erroneous. Imposing liability on the Defendants for defaming Bob Stover will not lead to garbled or skewed news reporting where a litigant/newspaper would be forced to ignore its in-court statements when issuing reports on the proceedings. Nor will it impose an undue burden on media Defendants to take special measures to insure the accuracy of their news stories. If the Journal seeks parity in reporting a judicial proceeding, it must have equal innocence with the other reporting media.

Removal of the privilege means only that a newspaper would be liable for republication of any of its in-court defamatory statements when the criteria and facts of the instant case are applicable. Clearly, the rule a newspaper follows in deciding whether to publish its own witness' statements is the very same rule that would control everyday publishing decisions regarding public figures or matter of public interest. If the article contains untruths or is published with reckless disregard for the truth, it should not be published.

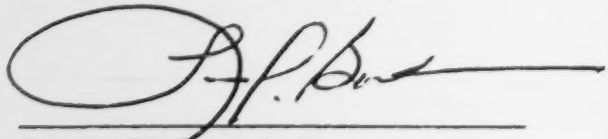
In further support of its decision, the appellate court concluded that application of the exception would (1) require an unsound intermingling of newsgathering and litigating responsibilities, and (2) bring about a "strange

result" where Sternlieb would be protected by the privilege and the Defendants would not. First, it is the appellate court's own decision that permits an unacceptable coupling of a newspaper's role as Defendant and as reporter. Second, the fact that Sternlieb would not be held liable for defamation while the Defendants would may be ironic, but certainly does not constitute a persuasive reason to insulate the Defendants from liability. Both Sternlieb and the Defendants made the in-court defamatory statements. Only the Defendants republished them. Thus, the exception should apply to them.

J. Conclusion.

In conclusion, this case presents a constitutional question of public concern regarding the balance between the rights of the public to a free and uninhibited press and the rights of the individual to be free from defamatory statements. The decision of the New Mexico Court of Appeals is in conflict with United States Supreme Court precedent on the issue of absolute privileges of the press, and renders it impossible for the individual to vindicate his constitutionally protected rights.

THE BRANCH LAW FIRM



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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BOB STOVER,

Plaintiff-Appellee,

vs. **No. 8503**

JOURNAL PUBLISHING COMPANY,
ALBUQUERQUE PUBLISHING COMPANY,
and THOMPSON H. LANG,

Defendants-Appellants.

APPEAL FROM
THE DISTRICT COURT OF BERNALILLO COUNTY

Rebecca Sitterly, Judge

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OPINION

BIVINS, Judge

This appeal presents the question whether a publisher loses the protection of the "fair report privilege" when statements reported fairly and accurately in a newspaper article originate from a witness located by the publisher in litigation involving the publisher. The parties appear to agree that this precise question has not heretofore been decided in New Mexico or by any other jurisdiction. Based on our own research, we agree, at least in terms of applying a self-reported statement exception to a member of the media who is also a party to a lawsuit.

The present action by plaintiff Bob Stover against Journal Publishing Company, Albuquerque Publishing Company, and Thompson H. Lang for defamation grew out of an earlier lawsuit brought by attorney William Marchiondo against one or more of the defendants in this case. As part of the pretrial discovery in the Marchiondo case, the *Journal* located several federally-protected witnesses, one of whom was Jerome Sternlieb, a self-acknowledged former underworld crime participant and a convicted felon. Because federally-protected witnesses are not available for interviews, the trial court ordered the *Journal* to provide Marchiondo with a pre-deposition affidavit of Sternlieb, disclosing the content of his expected testimony.

In the relevant part of his affidavit, Sternlieb recounted a visit he made to Albuquerque accompanied by James Vincent Napoli, Jr., "Lefty." In his affidavit, Sternlieb identified "Lefty" as the son of an underworld crime figure, James Vincent Napoli, Sr. According to Sternlieb:

> 8. On the morning after our arrival Lefty called an individual by the name of Bob Stover whom Lefty described as the Albuquerque Police Chief. Later this individual came to our room, introduced himself, talked briefly, including asking Lefty how Lefty's father was doing, and offered to drive us around Albuquerque in his automobile.

> 9. Bob Stover in fact drove us around Albuquerque that day first driving us past a shopping center which he stated was one of the properties in which James Vincent Napoli, Sr. had an interest, together with William C. Marchiondo and Governor Jerry Apodaca. This shopping center was not quite completed at this time. Stover stated that Governor Jerry Apodaca's wife and James Vincent Napoli's wife were going to operate a boutique type store in the shopping center.

On January 12, 1982, the *Journal* filed the Sternlieb affidavit which the trial court ordered sealed. The trial court, however, permitted Marchiondo's lawyer to provide a copy of the affidavit to Stover and to the former governor because their names were mentioned in the affidavit. At the time, Stover was a candidate for Sheriff of Bernalillo County, and Apodaca was a candidate for the United States Senate.

Apodaca's attorney called Judge Traub on April 12, 1982 to advise the court that Apodaca intended to call a press conference on April 14, 1982 to release the Sternlieb affidavit and to rebut its contents as applied to him. The trial court scheduled a hearing to decide whether the affidavit should be unsealed. Stover did not attend the hearing, and it is disputed whether he received notice of the hearing.

The *Journal* filed an unopposed motion to unseal the affidavit. At the hearing, Marchiondo's lawyer, at Stover's request, filed an affidavit by Stover denying the Sternlieb allegations. Prior to the unsealing of the Sternlieb affidavit, Stover was interviewed by KOAT-TV concerning Sternlieb's claims. On that evening, April 13, 1982, KOAT-TV, KOB-TV and KGGM-TV each carried accounts of the Sternlieb affidavit as well as Stover's rebuttal.

The following day, April 14, 1982, the *Journal* published an article concerning the affidavit and Stover's denials. The article appeared on the front page of the newspaper. Appearing next to the article were pictures of Stover, Napoli, Sr., Napoli, Jr., and Apodaca. The article recounted the allegations of the affidavit as well as the rebuttal contained in Stover's affidavit.

In his amended complaint for defamation, Stover sought damages on the bases of the filing of the Sternlieb affidavit and also the publication of the April 14th article. Stover contends that the *Journal* published the article with "a high degree of awareness of the (affidavit's) probable falsity." Stover's second cause of action was against defendant Lang. This cause of action primarily concerned Lang's statements, which appeared in the newspaper article.

Defendants moved for summary judgment on the basis that: (1) the filing of the Sternlieb affidavit was absolutely privileged; (2) the newspaper article reporting the affidavit was protected under the fair report privilege; and (3) defendant Lang's statements in the article were not susceptible of a defamatory meaning, were constitutionally protected opinions, and were true. For the purposes of defendants' motion only, the trial court assumed that the Sternlieb statements, as related to Stover, were defamatory and that defendants had "a high awareness of their probable falsity."

Following a hearing, the trial judge, Judge Sitterly, ruled that the affidavit was generated in a judicial proceeding, was reasonably related to that proceeding, and was, therefore, absolutely privileged. The trial court also ruled that the statements of defendant Lang and the placement of the pictures were not susceptible of defamatory meanings. As a result of these holdings, the trial court granted partial summary judgment in favor of all defendants, regarding the filing of the affidavit, the statements of Lang, and the positioning of the pictures in the news article.

The trial court, however, denied summary judgment as to the publication of the April 14, 1982 news article. While ruling, as a matter of law, that the article was fair and accurate, the trial court held that the fair report privilege "does not apply here due to comment (c) of Section 611, Restatement, Torts 2d," which provides in applicable part, "A person cannot confer this [fair report] privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated."

After skillfully posturing the issues, the trial court certified this question for interlocutory appeal, pursuant to NMSA 1978, Section 39-3-4,

as involving a controlling question of law as to which there is substantial ground for the difference of opinion, and that a resolution would materially advance the ultimate termination of this litigation. In fact, the trial court indicated that a definitive decision "will entirely dispose of this case in light of the court's other rulings."

This court agreed to accept defendants' application for interlocutory appeal to consider the question. Having done so, we now hold that even if comment (c) to Section 611 of the Restatement (Second) were adopted, it has no application to the facts of this case. Accordingly, we hold that the *Journal* did not lose the protection of the fair report privilege when it published an article which fairly and accurately reported the statements of a witness whom the *Journal* had located in the course of preparing for litigation in which the *Journal* was a defendant. For a clearer understanding of the question, we first discuss the fair report privilege. We then shall address the specific question raised.

1. ***The fair report privilege.***

The essence of the fair report privilege is that no liability will attach for the republication of the defamatory statements so long as the republication is a fair and accurate report of an official or public proceeding. The Restatement (Second) of Torts § 611 (1977) articulates the privilege as follows:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

New Mexico first recognized the fair report privilege in 1919 in *Henderson v. Dreyfus,* where the supreme court quoted with approval that '"[e]very impartial and accurate report of any proceeding in a public law court is privileged."' 26 N.M. 541, 566, 191 P. 442, 452 (1919), *quoting from* Newell on Slander and Libel § 646 (3d ed.). *See also Del Rico Co. v. New Mexican, Inc.,* 56 N.M. 538, 246 P.2d 206 (1952), *overruled on other grounds,* 98 N.M. 394, 404, 649 P.2d 462, 472 (1982); *Rockafellow v. New Mexico State Tribune Co.,* 74 N.M. 652, 397 P.2d 303 (1964); *Hubbard v. Journal Publishing Co.,* 69 N.M. 473, 368 P.2d 147 (1962).

Three reasons have been advanced for subordinating the defamed person's interest in his reputation to the interests of the public. Sowle, *Defamation and the First Amendment: The Case for a Constitutional Privilege of Fair Report,* 54 N.Y.U.L. Rev. 469, 483 (1979). The first is the agency theory. The rationale of the agency theory is that the reporter serves as the agent of the citizen who was absent at the public proceeding. The New Mexico Supreme Court recognized this function in *Del Rico Co. v. New Mexican, Inc.,* acknowledging that '[o]nly a small fraction of the population . . . would be able to attend meetings of this kind personally. Consequently, it was but natural that they should look to the press for information concerning them." 56 N.M. at 545, 246 P.2d at 211.

The second theory involves the public's supervisory function. This theory embodies recognition of the public's duty to scrutinize official conduct and to determine whether public policies and institutions serve public needs. Sowle, *supra* at 484-86; *see also Hughes v. Washington Daily News Co.,* 193 F.2d 922 (D.D.C.1952).

Finally, the fair report privilege is justified on the basis of its information function. The need of a self-governing society to be apprised fully of public concerns and controversies has been deemed to outweigh an individual's reputational concerns. Sowle, *supra* at 487.

Because the fair report privilege has the public interest as its foundation, the truth or falsity of statements made in the proceedings and reported to the public does not merit inquiry. *Ricci v. Venture Magazine, Inc.,* 574 F.Supp. 1563 (D.Mass.1983). The fact that statements made in the proceedings were false will not upset the privilege, not even when the reporter knew that the statements were false and reported them anyway. *Id.;* Restatement, *supra,* § 611, comment (a). There is a two-pronged justification for the lack of relevance concerning the truth or falsity of the statements and the reporter's knowledge thereof. First, the public is best served by exposure to the actual content of the official proceedings, regardless of whether all of the statements were true or false. *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964). Even if the reporter knows of the falsity of a statement, he is not restrained from reporting the information. The public has a right to access to a full account of a proceeding, not only to satisfy its informational concerns but

to fulfill its supervisory duties. *Bell v. Associated Press,* 584 F.Supp. 128 (D.D.C.1984). Second, to require a reporter to ascertain the truth or falsity of every statement uttered or published in an official or public proceeding would impose an intolerable burden on the press. *See,* 52 A.L.I. Proc. 186 (1975). If the press faced possible civil liability for every falsity published, coverage would be reduced and, as a result, the public's needs would suffer.

Thus, the fair report privilege protects against liability "even though the publisher himself does not believe the defamatory words he reports to be true and even when he knows them to be false." Restatement, *supra,* § 611, comment (a).

Abuse of the privilege takes place, however, when the publisher does not give a fair and accurate report of the proceeding. As stated in *Henderson v. Dreyfus:*

> While a person may publish a correct account of the proceedings in a court of justice, yet, if he discolors or garbles the proceedings, or adds comments and insinuations of his own in order to asperse the character of the parties concerned, it is libelous, and not privileged. 26 N.M. at 566, 191 P. at 452 (citation omitted).

The trial court held as a matter of law that the *Journal's* April 14, 1982 news article fairly and accurately reported the contents of the Sternlieb affidavit, a component of the judicial proceedings in the Marchiondo case. Therefore, unless the privilege is unavailable to defendants, as Stover claims, the privilege applies and insulates defendants from liability. Stover relies on comment (c) to Section 611 of the Restatement (Second) to support his claim. We now turn our attention to the pivotal question.

2. ***Whether defendants may exercise the privilege.***

Comment (c) to Section 611 of the Restatement (Second) provides in pertinent part: "A person cannot confer this [fair report] privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated." Restatement, *supra,* § 611, comment (c).

The parties sharply disagree as to whether comment (c), which purports to create a self-reported statement exception to the fair report privilege, was ever presented to or voted on by the American Law Institute (A.L.I.), publishers of the Restatement. We need not enter this debate or attempt to resolve the dispute, if, in fact, one exists. For the purposes of this appeal, we assume that the self-reported statement exception was adopted, and further assume that it expresses the common law. We make these assumptions because even if the exception represents the law, it does not apply, in any event, to the facts of the present case.

The self-reported statement exception does not apply for at least two reasons. First, the original defamatory publication was made by Sternlieb, not the *Journal* defendants. Stover attempts to overcome this distinction by arguing that John S. Donahue, an investigator for the *Journal* and an original defendant in this action, met with Sternlieb and provided Sternlieb false information which was incorporated in the affidavit. This argument fails for want of factual support. The record reflects that Sternlieb made substantially the same allegations to the Federal Bureau of Investigation more than a year before Donahue's alleged meeting with him. Moreover, Stover's original claim of conspiracy, based in part on allegations that defendants joined with Sternlieb to create the affidavit, was dismissed with prejudice.

Second, the exception, by its own terms, was obviously intended to prevent the abuse of the fair report privilege. For example, a person might bring a suit or hold a public meeting not with the intention of pursuing the purported objective but to cause harm to another, by pleading or announcing defamatory matter and then using the protective shield of the fair report privilege to republish the defamatory matter to the world or to a targeted audience.

Although decided on the basis of a New York statute, not comment (c), the case of *Williams v. Williams,* 23 N.Y.2d 592, 298 N.Y.S.2d 473, 246 N.E.2d 333 (1969), is helpful in understanding the exception. In that case, the defendants, through their corporation, had initiated an action against plaintiff alleging that plaintiff had conspired with others to misappropriate and to misuse the company's trade secrets and assets. Defendant then circulated copies of the complaint to members of plaintiff's trade. Plaintiff brought suit against defendants claiming, among

other things, that the action against him was totally without basis in fact, and was begun for the purpose of ruining his business reputation. Defendants asserted the fair report privilege as a defense and asked that plaintiff's complaint be dismissed. *Williams* affirmed denial of that motion, holding that the fair report privilege, as found in Section 74 of the New York Civil Rights Law, Consol.Laws, c.6, was never intended to permit a person maliciously to institute a judicial proceeding, alleging false and defamatory charges, then to circulate a press release or other communication based thereon, and, ultimately to escape liability by invoking the fair report privilege statute. Thus, the court grafted on to the fair report privilege statute, which otherwise provided an absolute privilege as long as the publication fairly and truly reported the judicial proceeding, an implied exception to meet the circumstances of that case.

In the case before us, the *Journal* defendants did not instigate the judicial proceedings in which the Sternlieb affidavit was filed; they were unwilling defendants. Further, the unrefuted evidence before us reflects that the *Journal's* newsgathering activities were executed completely independent of and separate from its defense of the Marchiondo case. Thus, the exception to the fair report privilege, as presented in comment (c), has no application to the facts of this case. The decision of whether that exception should be adopted at all will have to await a proper case.

Defendants argue, and we agree, that to apply the comment (c) exception to this case would undermine an important purpose of the fair report privilege, which is to allow the report of that which the public could have independently heard or read. The Sternlieb affidavit was unsealed and, therefore, available for public examination. As noted, it had already been reported by several television stations before the *Journal* published its article.

We also agree that to apply the exception under the circumstances of this case could lead to "inaccurate and unintelligible reporting." To relegate the *Journal* to publishing only rebuttal testimony, while denying it the right to report fairly and accurately the contents of the testimony in question, would result in skewed, garbled reporting, defeating the purpose of the privilege.

Stover argues that the *Journal* defendants lost their agency roles, that

is, to act as the agents of the citizen who was absent at the proceeding. Because defendants were parties to the *Marchiondo* case, Stover would place a burden on them to ascertain the truth of witnesses' statements before republishing them. Quite aside from the fact that the *Journal* defendants were unwilling defendants to that case and such burden would not be imposed on other members of the press, we reject as unsound a requirement that the media mix its responsibilties as an independent newsgatherer with its role in the defense of litigation in which it may be involved. To do so would not only be administratively impractical but likely would lead to violations of the ethical standards of the newspaper and legal professions.

Finally, it would bring about a strange result, indeed, to accord Sternlieb absolute immunity for making defamatory statements under the judicial privilege, *see Stryker v. Barbers Super Markets, Inc.*, 81 N.M. 44, 462 P.2d 629 (Ct.App.1969), while making defendants liable for having fairly and accurately reported the statements. The fair report privilege protects against such a result.

The parties have also argued the certified question on the basis of the First Amendment's guarantees of freedom of speech and freedom of the press. Because the question can be answered under the common law, we need not reach the constitutional issue. Courts will not decide constitutional questions unless necessary to the disposition of the case. *State v. Campbell*, 75 N.M. 86, 400 P.2d 956 (1965); *In re Bunnell*, 100 N.M. 242, 668 P.2d 1119 (Ct.App.1983).

The case is remanded to district court for further proceedings in accordance with this opinion. Defendants shall recover costs of appeal.

IT IS SO ORDERED.

WILLIAM W. BIVINS, Judge

WE CONCUR:

THOMAS A. DONNELLY, Chief Judge

JOE W. WOOD, Judge

APPENDIX B

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

BOB STOVER,

Petitioner,

v s No. 16,191

JOURNAL PUBLISHING CO., ALBUQUERQUE PUBLISHING CO. and THOMPSON H. LANG,

Respondents.

ORIGINAL PROCEEDING ON CERTIORARI

Rebecca Sitterly, District Judge

Turner W. Branch
Albuquerque, New Mexico

A. J. Ferrara
Albuquerque, New Mexico

Joseph P. Paone for Petitioner
Albuquerque, New Mexico

Rodey, Dickason, Sloan, Akin & Robb
William S. Dixon
Jill E. Adams
Albuquerque, New Mexico

Pryor, Cashman, Sherman & Flynn for Respondents
Nathaniel H. Akerman
New York, New York

OPINION

STOWERS, Justice.

We granted a writ of certiorari in this case to consider whether this Court should adopt as the law of New Mexico the Restatement (Second) of Torts Section 611 (1977) formulation of the fair report privilege for publication of defamatory matter in a report of a judicial proceeding, including the exceptions to the privilege defined in comment c of that Restatement section. Although Restatement (Second) of Torts Section 611 describes a privilege for the publication of fair and accurate reports of official proceedings and public meetings on matters of public concern, we here consider only the applicability of that section to reports of judicial proceedings. Our inquiry focuses upon the comment c exceptions that in some circumstances deny the privilege to defendants who publish such reports after participating in the making of the original defamatory statement.

The peculiar multiplicity of roles played by the defendants here make this a case of first impression not only in New Mexico but in any American jurisdiction. The Albuquerque *Journal,* in the course of defending another judicial proceeding, filed a witness's affidavit and then published a news article reporting its contents. Plaintiff-petitioner Bob Stover (Stover), the subject of the allegedly defamatory affidavit testimony and news article, brought this suit against the *Journal* and other corporate and individual defendants involved in the publication of the article.

Invoking the fair report privilege, the *Journal* defendants moved for summary judgment. The district court denied the motion on the ground that the comment c exception to Restatement (Second) of Torts Section 611 barred the defendants from invoking the privilege. On interlocutory appeal, the Court of Appeals held that the comment c exception did not apply to the facts of this case and reversed the district court's order.

After reviewing our law of defamation, we adopt Restatement (Second) of Torts Section 611 and comment c thereto as the law governing this case. We agree with Stover that the Court of Appeals read too narrowly the comment c exceptions to the fair report privilege. Therefore we reverse the Court of Appeals' decision and remand to the district

court for further proceedings.

The black letter of Restatement (Second) of Torts Section 611 states:

> The publication of defamatory matter concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported.

Because the fair report privilege is based upon the public's interest in receiving information about public proceedings, the privilege generally exists even when the publisher believes or knows the statements reported are false. Restatement (Second) of Torts § 611 comment a (1977). Comment c, however, provides that:

> [a] person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he had stated. This is true whether the original publication was privileged or not. Nor may he confer the privilege upon a third person, even a member of the communications media, by making the original statement under a collusive arrangement with that person for the purpose of conferring the privilege upon him.

Restatement (Second) of Torts § 611 comment c (1977).

On April 14, 1982, the Albuquerque *Journal* published a news article reporting a portion of the proceedings in the case of *Marchiondo v. Brown,* No. CV-75-02838 (Bernalillo County Dist. Ct. filed June 13, 1975), a libel action brought by attorney William Marchiondo against the *Journal* and other defendants. During a hearing the day before, the district court had unsealed an affidavit procured and filed upon court order by the *Journal* defendants in accordance with the court's procedure for obtaining a testimony of federally protected witnesses. In the affidavit Jerome Sternlieb, a convicted felon, connected Stover, former Governor Jerry Apodaca, and Marchiondo to organized crime figures. The news article reported these accusations and reported that during the hearing Stover had filed an affidavit denying Sternlieb's statements.

Stover, then a candidate for the office of Bernalillo County sheriff, subsequently filed the present libel action. His complaint alleged that, in the course of the *Marchiondo* litigation, the *Journal* and its agents conspired and combined to create the Sternlieb affidavit and to disseminate defamatory material about Stover not reasonably related to the issues in that case. It further alleged that the *Journal* published the defamatory news article with a high degree of awareness of the probable falsity of the statements about Stover. After extensive discovery, the *Journal* defendants moved for summary judgment on the ground that no genuine issue of material fact existed as to whether the publication was privileged.

Following a hearing, the district court granted partial summary judgment in favor of the defendants, holding that the initial publication of the Sternlieb affidavit by filing in court was absolutely privileged and that statements of defendant Lang cited in the article and the placement of Stover's photograph in the article were not susceptible of a defamatory meaning and were constitutionally protected statements of opinion. These determinations are not in issue here.

The district court, however, denied the defendants' motion for summary judgment as to the newspaper publication of portions of the Sternlieb affidavit. The parties had conceded that Stover was a "public figure" within the meaning of *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964), and therefore that Stover needed to prove that the defendants had acted with "actual malice." For purposes of determining the summary judgment motion, the district court first assumed that the statements cited from the affidavit were defamatory and that the defendants had reported them with a high awareness of their probable falsity, that is, that the defendants had published defamatory material with "actual malice." The district court then ruled, as a matter of law, that the news article was a fair and accurate report of courtroom proceedings in the *Marchiondo* case.

Such fair and accurate reports generally are protected from liability for defamation by the fair report privilege. The district court held that the defendants here were barred from invoking the privilege, however, because, according to Restatement (Second) Torts Section 611 comment c, "'a person cannot confer this privilege upon himself by making the original defamatory publication [i.e., filing of the affidavit] himself and

then reporting [i.e., publishing the article] to other people what he has [sic] stated.'" The district court then certified to the Court of Appeals for interlocutory appeal its decision concerning the availability of the fair report privilege in the circumstances of this case.

The Court of Appeals did not rule whether Restatement (Second) of Torts Section 611 and comment c represent the law of New Mexico, but assumed that they did. Reversing the district court's conclusion, the Court of Appeals held that the comment c exception did not apply to the facts of this case for two reasons. First, the *Journal* defendants did not "make" the original defamatory publication; Sternlieb "made" it. Second, the exception was intended to prevent abuse of the fair report privilege by plaintiffs maliciously instigating judicial proceedings in order to republish defamatory pleadings, not by involuntary defendants like the *Journal*. Therefore, the Court of Appeals held, the *Journal* defendants did not lose the protection of the fair report privilege. We do not agree.

Our constitution provides that "[e] very person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right . . ." N.M. Const. art. II, § 17. We long ago recognized that, as a general rule, "'[e]very impartial and accurate report of any proceeding in a public law court is privileged.'" *Henderson v. Dreyfus*, 26 N.M. 541, 566, 191 P. 442, 452 (1919) (quoting M. Newell, *The Law of Libel and Slander* § 646 (3d ed. 1914). Although the question whether the fair report privilege is absolute, or qualified and lost if the report is made maliciously, has been raised before this Court, until today we have not needed to answer it. *See Del Rico Co. v. New Mexican, Inc.*, 56 N.M. 538, 552, 246 P.2d 206, 215 (1952), *overruled on other grounds, Marchiondo v. Brown*, 98 N.M. 394, 649 P.2d 462 (1982); *Hubbard v. Journal Publishing Co.*, 69 N.M. 473, 475, 368 P.2d 147, 148 (1962)(citing W.Prosser, *The Law of Torts* § 95 (2d ed. 1955) and paraphrasing *id.* at 625)(right or privacy case; article published for proper purpose); *see also Blount v. T D Publishing Co.*, 77 N.M. 384, 388-89, 423 P.2d 421, 424 (1966)(right of privacy case; article newsworthy); *McNutt v. New Mexico State Tribune Co.*, 88 N.M. 162, 166-67, 538 P.2d 804, 808-09 (Ct.App.), *cert. denied*, 88 N.M. 318, 540 P.2d 248 (1975)(right of privacy case; article newsworthy).

The United State Supreme Court repeatedly has balanced the public's interest in an uninhibited press, protected by the first amendment to the United States Constitution, against the public's need for judicial redress of libelous utterances. *See Time, Inc. v. Firestone,* 424 U.S. 448, 456 (1976); *see also Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 340-47 (1974). It has held that the public interest in accurate reports of judicial proceedings is substantially protected by the prohibition of sanctions for the publication of truthful information contained in official court reports open to the public. *Firestone,* 424 U.S. at 457 (citing *Cox Broadcasting Co. v. Cohn,* 420 U.S. 469 (1975). Recognizing that "there is no constitutional value in false statements of fact," *Gertz,* 418 U.S. at 340, it has refused to extend a privilege to inaccurate and defamatory reports of facts aired in the course of judicial proceedings, *Firestone,* 424 U.S. at 455-57.

Neither the United States Supreme Court nor his Court has decided whether the balance of competing interests requires the extension of an absolute privilege to accurate reports of defamatory statements of fact made in the course of judicial proceedings. Our Court of Appeals has recognized that false statements of fact have no constitutional value, *Ammerman v. Hubbard Broadcasting, Inc.,* 91 N.M. 250, 253, 572 P.2d 1258, 1261 (Ct. App.), *cert. denied,* 91 N.M. 249, 572 P.2d 1257 (1977), *cert. denied,* 436 U.S. 906 (1978)(quoting *Gertz,* 418 U.S. at 340), and that the constitutional guarantees of freedom of speech and of the press "'can tolerate sanctions against calculated falsehood without significant impairment of their essential function.'" *McNutt,* 88 N.M. at 168, 538 P.2d at 810 (quoting *Time, Inc. v. Hill,* 385 U.S. 374, 389 (1967)). No New Mexico decision has suggested that absolute immunity without regard to purpose or reasonableness of conduct should be extended to the reporting of judicial proceedings. *See Neece v. Kantu,* 84 N.M. 700, 705, 507 P.2d 447, 452 (Ct.App.), *cert. denied sub nom. Ritschel v. Neece,* 84 N.M. 696, 507 P.2d 443 (1973); *Stryker v. Barbers Super Markets, Inc.,* 81 N.M. 44, 46, 462 P.2d 629, 631 (Ct.App.1969). We therefore hold that New Mexico law recognizes not an absolute but a qualified privilege for fair and accurate reports of judicial proceedings.

This Court must explicate our common law of defamation and must determine what constitutes an abuse of the right of free speech guaranteed by our constitution. *See* N.M. Const. art. II, § 17. New Mexico courts frequently have relied upon the Restatement (Second) of

Torts in deciding defamation cases. *See, e.g., Penny v. Sherman,* 101 N.M. 517, 520, 684 P.2d 1182, 1185 (Ct.App.), *cert. denied,* 101 N.M. 555, 685 P.2d 963 (1984)(Section 586: privilege for judicial proceedings); *Coronado Credit Union v. KOAT Television, Inc.,* 99 N.M. 233, 237 n.1, 656, P.2d 896 900 n.1 (Ct.App.1982)(Section 568a: television broadcast is libel, not slander); *Poorbaugh v. Mullen,* 99 N.M. 11, 20-21, 653 P.2d 511, 520-21, (Ct.App.), *cert. denied,* 99 N.M. 47, 653 P.2d 878 (1982)(Sections 562, 564A, 577, 593, 594, 596, 599: group libel; privileges); *Marchiondo v. New Mexico State Tribune Co.,* 98 N.M. 282, 292-95, 648 P.2d 321, 332-34 (Ct.App.1981), *cert. quashed,* 98 N.M. 336, 648, P.2d 794 (1982)(Section 566: fair comment privilege); *Kutz v. Independent Publishing Co.,* 97 N.M. 243, 245-46, 638 P.2d 1088, 1091-93 (Ct.App. 1981), *cert. denied,* 97 N.M. 483, 641 P.2d 514 (1982) (Sections 566, 621: fair comment privilege; actual malice); *Dominguez v. Stone,* 97 N.M. 211, 213, 638 P.2d 423, 425 (Ct.App.1981)(Section 559: defamatory communications defined); *Ammerman,* 91 N.M. at 254, 572 P.2d at 1262 (Section 580A: actual malice).

The Restatement (Second) of Torts Section 611 generally extends a privilege to publishers of fair and accurate reports of judicial proceedings which contain defamatory matter; comment c, however, excepts from that privilege publishers who alone or collusively take the opportunity to introduce defamatory matter into such a proceeding and then to publish it to the general public. We believe that the Restatement (Second) of Torts Section 611 and comment c provide clear guidelines for the conduct of reporters and for the analysis of defamation claims from their reports.

More importantly, we believe that Restatement (Second) of Torts Section 611 and comment c properly balance the public and private interests implicated when defamatory statements are made in the course of judicial proceedings. The public's interest in receiving fair and accurate reports of such proceedings will be served; publishers acting only as reporters will not bear the burden of establishing the truthfulness of every courtroom accusation they report; those few publishers who both participate in the making of defamatory statements in court and the reporting of those proceedings may be liable for the harm resulting from their abuse of the situation; and the individuals harmed by the dissemination of defamatory matter abusively introduced may be enti-

tled to some measure of recovery against the wrongdoers. We therefore adopt Restatement (Second) of Torts Section 611 and comment c thereto as the law of New Mexico governing the privilege to report judicial proceedings in situations in which the publisher of the report may have participated in the making of the original defamatory statement in the course of the proceedings.

We note that the courts of several other jurisdictions likewise have adopted Restatement (Second) of Torts Section 611 after reviewing their own decisions, the opinions of the United States Supreme Court discussing the constitutional guarantees of freedom of speech and of the press, and the works of torts commentators. *See Green Acres Trust v. London,* 141 Ariz. 609, 618-19, 688 P.2d 617, 626-27 (1984) (en banc); *Read v. News-Journal Co.,* 474 A.2d 119, 120-21 (Del.1984); *Phillips v. Evening Star Newspaper Co.,* 424 A.2d 78, 88-89 (D.C.App.1980), *cert. denied,* 451 U.S. 989 (1981); *O'Donnell v. Field Enterprises, Inc.,* 143 Ill.App.3d _____, _____, 96 Ill.Dec.752, _____, 491, N.E.2d 1212, 1215-16 (1986); *Shafer v. Lamar Publishing Co.,* 621 S.W.2d 709, 711-12 (Mo.App.1981); *Curran v. Philadelphia Newspapers, Inc.,* 497 Pa. 163, 182-83, 439 A.2d 652, 661 (1981); *see also Ricci v. Venture Magazine, Inc.,* 574 F.Supp. 1563, 1564, 1567-68 (D.Mass.1983)(relying on Section 611 and Massachusetts cases); *Kilgore v. Younger,* 30 Cal.3d 770, 776, 180 Cal.Rptr. 657, 660, 640 P.2d 793, 796 (1982)(en banc)(comparing Section 611 to Cal. Civ. Code Sections 47(4),(5) (West 1982)); *Mark v. Seattle Times,* 96 Wash.2d 473, 487, 635 P.2d 1081, 1089 (1981) (en banc), *cert. denied,* 457 U.S. 1124 (1982). We believe that these decisions represent the modern trend in defamation law and that, as the issue arises, these and other courts will join us in following Restatement (Second) of Torts Section 611 and comment c.

The Court of Appeals and the district court in the present case reached different conclusions as to whether, under Restatement (Second) of Torts Section 611 comment c, the *Journal* "made" the original defamatory publication itself when it filed Sternlieb's affidavit. We find it unnecessary to resolve this difference at this stage of the proceedings. Neither court below considered whether the fair report privilege in this situation was forfeited under the last sentence of comment c, which provides that the original publisher may not "confer the privilege upon a third person, even a member of the communications media, by making

the original statement under a collusive arrangement . . . for the purpose of conferring the privilege . . ."

The movants for summary judgment, the defendants here, bear the burden of showing the absence of a genuine issue of material fact or that they are entitled as a matter of law to a summary judgment in their favor. *Goodman v. Brock,* 83 N.M. 789, 793, 498 P.2d 676, 680 (1972). We have held that the fair report privilege is not absolute and that under the circumstances defendants are not entitled to summary judgment as a matter of law. The defendants' showing regarding the relationship between the Journal's agents and Sternlieb in the preparation and editing of the affidavit indicates that materials issues of fact remain under Restatement (Second) of Torts Section 611 comment c, and therefore we hold that defendants are not entitled to summary judgment.

Accordingly, we reverse the decision of the Court of Appeals and remand this case to the district court for further proceedings consistent with this opinion.

IT IS SO ORDERED.

HARRY E. STOWERS, JR.,
Chief Justice

WILLIAM RIORDAN, Justice

WILLIAM R. FEDERICI, Justice

DAN SOSA, JR., Senior Justice, Dissenting
MARY C. WALTERS, Justice, Dissenting

SOSA AND WALTERS, Justices (Dissenting).

We cannot concur because, although we have no disagreement with the law stated in the opinion, the trial court is to determine on remand whether there was collusion that would bring Section 611(c) of *Restatement (Second) of Torts* into operation. As Judge Bivins noted in his opinion:

> The record reflects that Sternlieb made substantially the same allegations to the Federal Bureau of Investigation more than a year before Donahue's alleged meeting with him. Moreover, Stover's original claim of conspiracy, based in part on allegations that defendants joined with Sternlieb to create the affidavit, was dismissed with prejudice.

We believe the issue addressed in the majority opinion has already been disposed of.

The opinion of the Court of Appeals shall be published as an Appendix to this dissent.

DAN SOSA, JR., Senior Justice

MARY C. WALTERS, Justice

APPENDIX C

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Wednesday, January 28, 1987

NO. 16,191

BOB STOVER,

Petitioner,

vs.

JOURNAL PUBLISHING CO.,
ALBUQUERQUE PUBLISHING CO.
and THOMPSON H. LANG,

Respondents.

This matter coming on for consideration by the Court upon Motion for Rehearing, and the Court having entered an order on January 26, 1987, granting said motion for rehearing;

NOW, THEREFORE, IT IS ORDERED that the Opinion handed down by this Court on December 11, 1986 is hereby withdrawn;

IT IS FURTHER ORDERED that the Writ of Certiorari heretofore issued by this Court on January 16, 1986 is hereby quashed as having been improvidently issued.

IT IS FURTHER ORDERED that the Record in Cause No. 8503 is hereby returned to the Clerk of the Court of Appeals.

ATTEST: A TRUE COPY

_____

Clerk of the Supreme Court
of the State of New Mexico

APPENDIX D

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Friday, June 26, 1987

NO. 16,191

BOB STOVER,

Petitioner,

vs.

JOURNAL PUBLISHING CO.,
et al.,

Respondents.

This matter coming on for consideration by the Court upon Motion for rehearing, and the Court having considered said Motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that the Motion for Rehearing is hereby denied.

ATTEST: A TRUE COPY

_____

Clerk of the Supreme Court
of the State of New Mexico

APPENDIX E

SECOND JUDICIAL DISTRICT COURT

COUNTY OF BERNALILLO

STATE OF NEW MEXICO

NO. CV-84-02412

BOB STOVER,
Plaintiff,

vs.

JOURNAL PUBLISHING COMPANY
ALBUQUERQUE PUBLISHING
COMPANY, AND THOMPSON H. LANG,
Defendants.

ORDER GRANTING SUMMARY JUDGMENT AND AUTHORIZING INTERLOCUTORY APPEAL ON DENIAL OF SUMMARY JUDGMENT

This matter having come on before the Court on Defendants' motion for summary judgment on the amended complaint for defamation, and the Court having considered the arguments of counsel, having reviewed the evidence and being fully advised herein,

1. The Defendants herein were also Defendants in *Marchiondo v. Brown, et al.*, Cause No. CV-6-75-02838, District Court, Second Judicial District, County of Bernalillo, State of New Mexico [hereafter the Marchiondo Case].

2. On January 12, 1982, an affidavit signed by Jerome Sternlieb was filed in the *Marchiondo* Case.

3. On April 14, 1982, an Albuquerque Journal article reported portions of Sternlieb's affidavit, and other statements.

4. For purposes of this motion only, the Court assumes that Paragraphs 8 and 9 of said affidavit are defamatory to the Plaintiff and Defendants had a high awareness of their probable falsity.

5. The filing of the affidavit was done in the course of a judicial proceeding, was reasonably related to the subject matter of that litigation, and is absolutely privileged.

6. Whether the April 14, 1982, Albuquerque Journal article is a fair and accurate report of the courtroom proceeding in the *Marchiondo* Case is a question of law.

7. The April 14, 1982, article fairly and accurately reported a judicial proceeding the *Marchiondo* Case.

8. The statements of Thompson H. Lang in the April 14 article and the placement of Plaintiff's photograph in relation to the headline, the article and the other photographs are not susceptible to a defamatory meaning and are protected statements of opinion.

9. The Defendants cannot invoke the fair report privilege since, according to comment (c) of Section 611 of the Restatement of Torts, "a person cannot confer this privilege upon himself by making the original defamatory publication himself and then reporting to other people what he has stated."

Summary Judgment In Favor Of Defendants Regarding Filing Of The Sternlieb Affidavit On January 12, 1982

10. IT IS ORDERED, ADJUDGED AND DECREED that the affidavit was generated in the course of a judicial proceeding, was reasonably related to the subject matter of the *Marchiondo* case, and is absolutely privileged.

11. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that summary judgment in favor of all defendants be and hereby is granted as to the filing of the Sternlieb affidavit.

Summary Judgment In Favor Of Defendants Regarding Statements Of Defendant Lang In The April 14, 1982 Albuquerque Journal Article

12. IT IS ORDERED, ADJUDGED AND DECREED that to the extent the first and second causes of action are based on statements by Defendant Lang in the newspaper article of April 14, 1982, or the placement of Plaintiff's photograph in relation to the headline, the article and the other photographs, these statements are not susceptible to a defamatory meaning, are constitutionally protected opinions and are not actionable.

13. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that to the extent that the first and second causes of action are based on statements by Defendant Lang in the newspaper article of April 14, 1982, or the placement of Plaintiff's photograph in relation to the headline, the article and the other photographs, summary judgment in favor of the Defendants is hereby granted.

Denial Of Summary Judgment Regarding Reporting Of Sternlieb Affidavit In The April 14, 1982 Albuquerque Journal Article

14. IT IS ORDERED, ADJUDGED AND DECREED that with respect to the reporting of the Sternlieb affidavit in the article of April 14, 1982, the article was a fair and accurate account of the judicial proceeding which was reported, such being a question of law.

15. IT IS ORDERED, ADJUDGED AND DECREED that summary judgment is denied as to Defendants Lang, Journal Publishing Company and Albuquerque Publishing Company on the ground that the fair report privilege does not apply here due to comment (c) of Section 611, Restatement, Torts 2d.

Certification For Interlocutory Appeal And Stay Of Proceeding

16. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Court finds that this order and decision involves a controlling question of law to which there is substantial ground for difference of opinion, that a definitive resolution of this question may be case dispositive, and that an immediate appeal from this order and decision may materially advance the ultimate determination of the litigation. The trial court estimates the length of trial of this case to be at least one month and pretrial discovery will be extremely costly and time-consuming for both parties. In the event the court is incorrect in its

determination with respect to the availability of the fair report privilege under the circumstances of this case, a definitive decision by the New Mexico appellate courts will entirely dispose of this case in light of the court's other rulings.

17. IT IS FURTHER ORDERED, ADJUDGED AND DECREED that as of March 1, 1985, all proceedings in this action, including all discovery, be and hereby is stayed pending an appeal to the proper appellate court.

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DISTRICT COURT JUDGE

Supreme Court, U.S.
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No. 87-231

(2)

In The
Supreme Court of the United States
October Term, 1986

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BOB STOVER,

Plaintiff-Petitioner,

vs.

JOURNAL PUBLISHING CO.,
ALBUQUERQUE PUBLISHING CO.,
AND THOMPSON H. LANG,

Defendants-Respondents.

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RESPONSE TO PETITION FOR CERTIORARI

—o—

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QUESTION PRESENTED FOR REVIEW

Whether the New Mexico Court of Appeals' interpretation of New Mexico's report privilege to protect a newspaper's fair and accurate report of a judicial proceeding to which it is a party, including statements made by a witness discovered by the newspaper, presents any federal constitutional claim or right appropriate for review under 28 U.S.C. § 1257(3).

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STATEMENT OF THE CASE

On May 31, 1978, one William Marchiondo sued the Journal Publishing Company[1] and others (hereinafter col-

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[1] Subsidiaries of the Journal Publishing Company are defendant Albuquerque Publishing Company, Magnum Systems, Inc., Starline Printing, Inc., Research & Polling, Inc., Corporate Security & Investigations, Inc., and Data Processing & Engineering, Inc., all New Mexico corporations; Journal Center Corporation, a Delaware corporation; Albuquerque Journal Publishing Company-El Paso, a Texas corporation; and Centurion Services, Ltd., a New York corporation.

lectively referred to as the Journal defendants) for libel over the publication of a newspaper article allegedly linking Marchiondo to organized crime. During discovery in support of its defense of truth, the Journal defendants located a federally-protected witness named Jerome Sternlieb, who had firsthand information establishing Marchiondo's connection with organized crime in New Mexico.

Sternlieb had a track record of giving law enforcement officials valuable information on organized crime. As a federally protected witness, Sternlieb could not be easily subpoenaed and was not readily available for interviews by counsel. To facilitate Marchiondo's preparation for depositions of such witnesses, the trial court established a procedure under which the Journal defendants were required to file a pre-deposition affidavit disclosing the substance of the witness' anticipated testimony. On December 14, 1981, the district court ordered the Journal defendants to obtain Sternlieb's affidavit before taking his deposition. *See* Statement of Material and Uncontested Facts in Support of Defendant's Motion for Summary Judgment at ¶¶ 2-8, *Stover v. Journal Publishing Co.*, No. CV-84-02412 (N.M. Dist. Ct. Apr. 15, 1985) [hereinafter Uncontested Facts] [reproduced in Appendix A].[2]

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[2] The Journal defendants have cited their "Statement of Material and Uncontested Facts" because petitioner—by failing to offer controverting facts to the district court—is deemed to have accepted the Journal defendants' statement of facts as true. *See State ex rel. Bardacke v. New Mexico Fed. Savings & Loan Ass'n*, 102 N.M. 673, 675, 699 P.2d 604, 606 (1985); N.M. 2d Judicial Dist. R. 13(d)(2) (party opposing summary judgment must "set forth the material facts as to which the party contends a genuine issue does exist").

On December 18, 1981, the attorneys for the Journal defendants obtained an affidavit setting forth the substance of Sternlieb's anticipated testimony. Sternlieb averred that in late December 1976—early January 1977, he had traveled to Albuquerque with the son of well-known organized crime figure James Napoli and that he had been driven around Albuquerque by Albuquerque Police Chief Bob Stover to see businesses secretly owned by Napoli, Marchiondo, and then-Governor Jerry Apodaca. Sternlieb had made the same allegations concerning Stover to the FBI on July 2, 1980, a year-and-a-half before any representative of the Journal defendants met with him as part of their pretrial discovery in the *Marchiondo* case. *See Stover v. Journal Publishing Co.*, 105 N.M. 291, 292, 295, 731 P.2d 1335, 1336, 1339 (Ct. App. 1985) [reproduced in Petition for Certiorari app. A], *cert. quashed*, 105 N.M. 290, 731 P.2d 1334 (1987); Uncontested Facts at ¶ 9.

On January 12, 1982, counsel for Journal defendants filed the affidavit as directed by the court. The court ordered it sealed but allowed Marchiondo's counsel to provide a copy to former New Mexico Governor Jerry Apodaca and ex-police chief Bob Stover. On January 25 and 26, 1982, the Journal defendants deposed Sternlieb, and the deposition was filed of record with the court. *Stover*, 105 N.M. at 292, 731 P.2d at 1336, Petition for Certiorari app. A at 2; Uncontested Facts at ¶ 16.

On April 12, 1982, an attorney for Apodaca, then a candidate for Democratic nomination for United States Senator, informed the court that Apodaca intended to hold a press conference on April 14, 1982 to release the affidavit and rebut its contents. The court then ordered a hearing

for the afternoon of April 13, 1982. Stover did not personally attend the hearing, but on April 13, 1982, before the hearing or any public report of the affidavit, Stover gave an interview to a reporter from KOAT-TV and discussed on camera certain of Sternlieb's allegations concerning him. *Stover*, 105 N.M. at 293, 731 P.2d at 1337, Petition for Certiorari app. A at 2.

At the hearing, Marchiondo's attorney, at Stover's direction, filed an affidavit from Stover, rebutting the Sternlieb allegations. The court ordered the Sternlieb affidavit unsealed and its contents, along with Stover's rebuttal, were reported extensively that night by KOB-TV, KOAT-TV and KGGM-TV on the evening and late-night news. *Id.*

On April 14, 1982, the Albuquerque Journal reported on the judicial proceeding at which the affidavit was unsealed, including the substance of the Sternlieb affidavit and Stover's denials.[3] *Id.*

On April 12, 1984, Stover filed an action against Journal Publishing Company, Sternlieb, and others employed by the Journal, for defamation based on the Journal's reporting of the affidavit on April 14, 1982. The complaint alleged a conspiracy between these Journal defendants and Sternlieb to procure, file and publish the contents of Sternlieb's allegedly false affidavit. On January 18, 1985, Stover asked for leave to amend his complaint and delete any allegations of conspiracy or collusion between Sternlieb and the Journal defendants to create and publish a

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[3] The Albuquerque Journal maintained a strict separation between its newsgathering function and the conduct of the Marchiondo litigation. *See Stover*, 105 N.M. at 296, 731 P.2d at 1340, Petition for Certiorari app. A at 8.

false affidavit. The district court entered an order dismissing with prejudice any causes of action or allegations of conspiracy to publish a false affidavit and dismissing Sternlieb and three Journal defendants with prejudice. *See id.* at 295, 731 P.2d at 1339, Petition for Certiorari app. A at 7; Complaint for Libel, *Stover v. Journal Publishing Co.*, No. CV-84-02412 (N.M. Dist. Ct. Apr. 15, 1985); Motion for Leave to Amend Complaint, *Stover;* Order Granting Leave to File Amended Complaint, *Stover* (filed Mar. 5, 1985).

On Journal defendants' motion for summary judgment, the district court ruled that the Sternlieb affidavit had been germane to the *Marchiondo* case and that the April 14 article had been a fair and accurate report of the judicial proceeding at which the Sternlieb affidavit was unsealed. The district court further ruled (1) that New Mexico would adopt the exception to the fair report privilege for self-reported statements as set forth in *Restatement (Second) of Torts* § 611 comment c (1977), and (2) that the exception applied even to reports of testimony of a non-party witness discovered by the party who fairly and accurately reports the judicial proceeding in which the testimony is given. The district court denied summary judgment on the publication of the April 14 article, and certified the issue for interlocutory appeal.[4] *See Stover*, 105 N.M. at 293, 731 P.2d at 1337, Petition for Certiorari app. A at 3-4. At no time in the district court did Stover argue that the exception in comment c was constitutionally mandated.

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[4] The district court granted summary judgment on Stover's cause of action based on the filing of the Sternlieb affidavit on the ground that an absolute privilege protected statements made in the course of judicial proceedings. *See Stover*, 105 N.M. at 293, 731 P.2d at 1337, Petition for Certiorari app. A at 3.

The New Mexico Court of Appeals accepted the certification on the applicability of comment c to the facts of this case and on no other issues decided at summary judgment.[5] *See id.* It then assumed that New Mexico would recognize the exception to the report privilege set forth in comment c but ruled that New Mexico would not apply the exception to the specific facts of this case since Sternlieb, not the Journal defendants, had made the statements fairly and accurately reported on April 14. The court thus limited the application of the exception in comment c to statements made by a party, not by a witness. The Court of Appeals did not base its decision or its construction of the report privilege on any federal constitutional right but rather ruled that New Mexico's common law of defamation would not recognize an exception to the report privilege for the circumstances of this case. *See id.* at 295-97, 731 P.2d at 1339-41, Petition for Certiorari app. A at 6-9.

The New Mexico Supreme Court granted certiorari to review the decision of the Court of Appeals and issued an opinion which petitioner greatly relies on here. This opinion was withdrawn, the writ of certiorari quashed, and the case remanded to the Court of Appeals. *See* Petition for Certiorari apps. B-C. On February 11, 1987, the mandate of the Court of Appeals was returned to the district court. On August 6, 1987, the district court entered final judgment in favor of defendants.

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[5] New Mexico's statute on interlocutory appeals requires both that the district court certify and that the reviewing court accept the issues certified before any issue can be entertained in any interlocutory appeal. *See, e.g., State v. Hernandez,* 95 N.M. 125, 126, 619 P.2d 570, 571 (Ct. App. 1980).

ARGUMENT

I. The decision of the New Mexico Court of Appeals is not based on the denial of any constitutional claim advanced by Petitioner or on the interpretation of any constitutional claim in favor of the Journal defendants.

In this case the Court of Appeals did not deny any federal constitutional claim advanced by petitioner, nor did it base its decision on any constitutional right asserted by the Journal defendants. Quite simply, the Court of Appeals reached its decision by construing New Mexico's common law, not the United States Constitution.

The Court of Appeals ruled that even if comment c to § 611 of the *Restatement (Second) of Torts* does apply in New Mexico, it does not apply where a witness' in-court statement is fairly and accurately reported by the party locating him. By so ruling, the court avoided having to decide the Journal defendants' contention that an exception to the report privilege in the circumstances of this case would violate freedom of speech and press under the first amendment. The Court of Appeals ruled:

> The parties have also argued the certified question on the basis of the First Amendment's guarantees of freedom of speech and freedom of the press. Because the question can be answered under the common law, we need not reach the constitutional issue. Courts will not decide constitutional questions unless necessary to the disposition of the case.

105 N.M. at 296-97, 731 P.2d at 1340-41.[6] The Court of Appeals interpreted the common law of the State of New

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[6] Thus this case does *not* present a judgment which has been based on a federal constitutional ground but which can

(Continued on following page)

Mexico to preclude the application of the exception in comment c to the case at bar and specifically eschewed reliance on or interpretation of the federal constitutional claims presented. Its decision was based exclusively on its interpretation of New Mexico's common law of libel.[7]

Furthermore, petitioner does not contend that the Court of Appeals denied any federal constitutional right in interpreting the report privilege as it did. In the district court and in the New Mexico Court of Appeals, petitioner did not claim that his vision of the parameters of comment c was constitutionally required. Nor could he. This Court has previously ruled that a reputational interest under state law is not a liberty or property interest under the due process clause of the fourteenth amendment. *See Paul v. Davis,* 424 U.S. 693 (1976). The states are

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(Continued from previous page)

be supported as well by an independent state ground. *See, e.g., Michigan v. Long,* 463 U.S. 1032 (1983). Here, the lower state court did not purport to rule on any federal claim at all but decided the case exclusively under the state's common law.

7 The only federal constitutional claims on appeal were advanced by the Journal defendants. As a review of his brief demonstrates, petitioner clearly did not argue that the United States Constitution required an exception to the fair report privilege. Petitioner's discussion of the first amendment was exclusively in the context of rebutting the Journal defendants' claims that the exception urged by petitioner would violate the first amendment and deny them equal protection under the fourteenth amendment. *See* Appellee's Answer Brief on Interlocutory Appeal at 22-30, *Stover.* The Court of Appeals found it unnecessary to rule on the constitutional claims since it held that New Mexico's common law did not provide for an exception under the circumstances of this case.

free to develop the contours of their common law privileges so long as they are consistent with the first amendment.

At most, petitioner complains that the New Mexico Court of Appeals has misconstrued both the *Restatement (Second) of Torts* and *Webster's New Collegiate Dictionary*. *See* Petition for Certiorari at 8-9. Even if such an error could be demonstrated, it would not implicate a federal constitutional right.

II. The Court of Appeals' decision is not inconsistent with this Court's decision in Time, Inc. v. Firestone, 424 U.S. 448 (1976).

Although petitioner's statement of the "question presented for review" is devoid of any reference to any constitutional right which he was denied by the ruling of the Court of Appeals, he argues that *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), is somehow contrary to the decision of the New Mexico Court of Appeals. *Time, Inc. v. Firestone* simply has no application to this case. The nub of the libel in *Firestone* was Time's report that Mr. Firestone had been granted his divorce on the ground of adultery.[8] Since Mrs. Firestone had been granted alimony, which could not have been awarded under state law to a party who had committed adultery, the lower court found, and this Court agreed, that the report in *Firestone* was "inaccurate and false." 424 U.S. at 455. Had Time's report been fair and accurate, it would have been absolutely protected under Florida's report privilege.

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[8] The excerpt set forth on page 7 of the Petition for Certiorari was not the portion of the report which Mrs. Firestone claimed was libelous. *See* 424 U.S. at 458-59.

In sum, *Firestone* did not involve the fair and accurate report of a judicial proceeding but a misleading and inaccurate report unprotected by the report privilege. Here, the district court determined that the April 14 report of the judicial proceeding was fair and accurate. Thus, the decision of the New Mexico Court of Appeals is consistent with *Firestone*.

III. The Court of Appeals' decision is consistent with this Court's ruling in Gertz that state courts have considerable latitude in developing their law of defamation so long as the first amendment is not violated.

Petitioner contends that the New Mexico Court of Appeals' decision "is in conflict with this Court's development of the law of libel." This Court's decisions in the area of defamation have not developed the substantive law of libel beyond prescribing the constitutional minima below which the states cannot impose liability. *Gertz v. Welch*, 418 U.S. 323 (1974), clearly left the states free to develop greater protection for the press under their common law than is required by the first amendment:

> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual.

Id. at 347. Neither *Firestone* nor any other decision of this Court limits a state's power to develop its own common law of defamation, so long as the minimal protection afforded by the first amendment is not breached. Petitioner confuses the minimal requirements which the first amendment commands with the more stringent require-

ments which a state, in its wisdom, may adopt consistently with *Gertz*.

IV. The decision of the lower state court here is bereft of judicial importance.

In essence, petitioner is asking this Court to act as a final arbiter of a development in state tort law which in no way implicates any constitutional right or claim. Petitioner's quarrel with New Mexico law does not concern an issue of broad and predominating public interest or far-reaching application to a vast number of cases arising in the state and federal courts. The critical issue in this appeal involved the interpretation of an obscure exception to the report privilege on which a dearth of case law exists. New Mexico's resolution of the issue may be of some passing interest to scholars in the law of libel but is hardly of supervening jurisprudential interest or of special import to the federal or state judiciary.

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CONCLUSION

This case is clearly not one which involves an issue of profound public interest or which will have application to a vast array of cases, and in no way does it concern the 200-year-old document that this Court is sworn to protect. The petition for certiorari should be denied.

Respectfully submitted,

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APPENDIX A

SECOND JUDICIAL DISTRICT COURT
COUNTY OF BERNALILLO
STATE OF NEW MEXICO

BOB STOVER, Plaintiff,	)	
vs.	)	NO. CV-84-02412
JOURNAL PUBLISHING COMPANY, ALBUQUERQUE PUBLISHING COMPANY, THOMPSON H. LANG, GERALD CRAWFORD, JOHN H. DONOHUE, WILLIAM HUME and JEROME STERNLIEB, Defendants.	)	(Feb. 25, 1985)

STATEMENT OF MATERIAL AND UNCONTESTED FACTS IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. THE *MARCHIONDO V. BROWN* CASE RAISED ISSUES CONCERNING MARCHIONDO'S CONNECTION TO ORGANIZED CRIME AND HIS POLITICAL INFLUENCE IN NEW MEXICO.

1. On June 13, 1975, William C. Marchiondo filed an action for libel against Robert A. Brown, Ralph Looney, Albuquerque Tribune, Albuquerque Journal, Thompson H. Lang, Albuquerque Publishing Company (N.S.L.), Journal Publishing Company, Scripps-Howard Publishing Company, and unnamed John and Jane Does. The basis of the libel action was the publication of two editorials and an advertisement attached to the original complaint as exhibits. One of the editorials, endorsing Apodaca's opponent for

Governor, described Marchiondo "[a]s a criminal lawyer . . . [who] thrives by having friends in key places." The advertisement, sponsored by the Republican Party, stated that "Jerry Apodaca would be the kind of Governor who would appoint Billy Marchiondo as chairman of the New Mexico Racing Commission. That's why we say he's the man nobody can afford."[1]

2. On approximately May 31, 1978, Mr. Marchiondo filed an amended complaint of libel based on an article published in the *Albuquerque Journal* on March 26, 1977. The headline of the article read, "Organized Crime Showing Interest in New Mexico" and the article reported among other things Marchiondo's close association with New York organized crime leader James Vincent Napoli, Sr.[2]

3. The amended complaint alleged that this article "was calculated to convey the impression that plaintiff was connected with organized crime in New Mexico and defendants intended to mean and meant that plaintiff was associated with the Mafia."[3]

4. The *Marchiondo* case went to trial based on the alleged libel in the article of March 26, 1977. Although Marchiondo's claims based upon the prior articles had been dismissed, Marchiondo successfully introduced these articles into evidence at trial as proof of the defendants' state of mind.[4]

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1 Exhibit A, Complaint and two attachments.

2 Exhibit B, Amended Complaint and article.

3 *Id.*

4 Exhibit C, Newspaper Articles.

II. IT WAS THE PRACTICE ESTABLISHED BY JUDGE TRAUB IN THE *MARCHIONDO V. BROWN* LITIGATION TO REQUIRE THE DEFENDANTS TO PROVIDE AFFIDAVITS OF WITNESSES WHO WERE IN THE JUSTICE DEPARTMENT'S WITNESS PROTECTION PROGRAM BEFORE DEPOSING THEM.

5. During the course of litigation in the *Marchiondo* case, it became necessary to depose certain witnesses in the U. S. Justice Department's Witness Protection Program. In order to protect these witnesses from reprisals from criminal defendants against whom they were testifying, they had been given new identities and had been relocated to secret residences by the U.S. Marshall Service. For that reason, unlike other witnesses, they were not readily accessible by subpoena if the plaintiff desired additional deposition sessions; nor were they available for interviews by opposing counsel. "[I]n order to give counsel for the other side the substance of what the individual would testify about," Judge Traub established a practice in *Marchiondo v. Brown* that before witnesses in the Justice Department's Witness Protection Program could be deposed, an affidavit first had to be provided to the plaintiff setting forth the witness' anticipated testimony.[5] The purpose of this practice was to provide plaintiff's counsel with ample opportunity to prepare for cross-examination of the witness. The practice of requiring affidavits prior to the depositions obviated the need for additional deposition sessions which would have been

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[5] Exhibit D, Dines' Deposition, pp. 34-37 and 40-42 and Exhibit E, In-Camera Transcript of Proceedings, December 14, 1981, pp. 4-5.

difficult to arrange due to the witnesses' enrollment in the Witness Protection Program.

6. This practice began with the affidavit of Aladena T. Fratianno, which was taken by the defendants on November 13, 1980,[6] prior to his deposition on January 8, 1981, in California.[7] It was followed in deposing Jerome Sternlieb and later in deposing Norman B. Duncan on June 26, 1982.[8]

III. IN ACCORDANCE WITH THE PRACTICE ESTABLISHED BY THE COURT JUDGE TRAUB ORDERED THE DEFENDANTS TO FILE AN AFFIDAVIT OF JEROME STERNLIEB.

7. On December 14, 1981, Thompson Hughes Lang, a defendant in the *Marchiondo* case, was deposed by the plaintiff. When asked if there were "other witnesses that you or the Journal Publishing Company have access to, or know of, of people who claim to have knowledge of the exercise of influence by William Marchiondo on any state officials at all besides Norman Duncan,"[9] Mr. Lang declined to answer, and an *ex parte, in camera* session was held between the defendants' attorneys, Eric Lanphere and Jim Dines, and Judge Traub. At that time the attorneys explained to Judge Traub that the defen-

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6 Exhibit F, Fratianno's Affidavit and Exhibit D, Dines' Deposition, pp. 161-6.

7 Exhibit G, cover page of Fratianno's Deposition.

8 Exhibit H, Duncan's Affidavit; Exhibit I, Transmittal Letter; and Exhibit J, cover page of Duncan's Deposition.

9 Exhibit K, Lang's Deposition, (*Marchiondo* case), pp. 73, 81-2.

dants did not want to disclose the identity of a particular person (who was later disclosed to be Jerome Sternlieb) because of a concern for his physical safety. The attorneys explained that this potential witness was "in great fear of his life," that he was in the Justice Department's Witness Protection Program, and that it was then uncertain whether arrangements could be made "to come out in the open with his name."[10]

8. In keeping with the practice initiated with the Fratianno deposition, Judge Traub stated:

> I take it before you would depose this witness, you would if everything goes according to your plan, secure an affidavit from him, file it with the court, and give a copy of it to the plaintiff's attorneys so that they are alerted as to what the deposition is going to be all about . . . [so] they would then at least know the subject of what the deposition is about, so they can cross-examine.[11]

The Court then ruled in open court that Mr. Lang did not have to disclose the identity of the witness until such time as the witness signed an affidavit to be filed with the Court and served it upon the plaintiff. The Court held as follows:

> Mr. Lang does not have to disclose the name, address or whereabouts, or any other information concerning the witness, and that no such information will have to be disclosed until such time as the witness signs an affidavit *which will be filed in the court file;* copy, of course to plaintiff's counsel sufficiently in advance of his deposition, which is anticipated will be taken at

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[10] Exhibit E, In-Camera Transcript of Proceedings, December 14, 1981, p. 3.

[11] *Id.*, pp. 4-5.

> some time in the case prior to trial, and this will alert the plaintiff as to who he is and what the substance of his testimony is expected to be. (Emphasis added.)[12]

9. Four days later, on December 18, 1981, Sternlieb's affidavit was taken, but because of a delay caused by arranging for the security precautions for his deposition, his affidavit was not filed until January 12, 1982.[13] Sternlieb's affidavit was also filed as an attachment to the affidavit of Thompson H. Lang of January 12, 1982,[14] in direct response to the plaintiff's Motion for Disclosure and Deposition of Informant, which had been filed on December 30, 1981 and plaintiff's Motion for Production of Documents, also filed on that date, which sought, among other things, the production of all documents relating to "the alleged confidential information/witness, disclosed during the deposition of defendant Thompson Hughes Lang."[15]

10. The Sternlieb Affidavit was filed in Judge Traub's chambers in the presence of the Court and plaintiff's counsel, Ernesto Romero.[16] At the request of plaintiff's counsel, Judge Traub sealed the Sternlieb Affidavit and ordered the parties to refrain "from disclosing the contents of the affidavit."[17] The Court, however, did per-

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12 Exhibit K, Lang's Deposition, pp. 85-6.

13 Exhibit D, Dines' Deposition, pp. 67-68 and Exhibit L, Transcript of Proceedings, January 12, 1982.

14 Exhibit M, Lang's Affidavit of January 12, 1982.

15 Exhibit N, Motion for Disclosure and Deposition of Informant; and Motion for Production of Documents.

16 Exhibit L, Transcript of Proceedings, January 12, 1982, pp. 12-14.

17 *Id.*

mit the plaintiff to "discuss . . . the contents of the affidavit with . . . parties whose names are mentioned in it,"[18] "provided that they were cautioned concerning the Court's instruction."[19]

IV. THE INFORMATION CONTAINED IN THE STERNLIEB AFFIDAVIT CONCERNING STOVER WAS RELATED DIRECTLY TO THE DEFENDANTS' TRUTH DEFENSE IN *MARCHIONDO V. BROWN*.

11. As Stover acknowledged in his deposition, "one of the issues in the [Marchiondo] lawsuit was Mr. Marchiondo's connection to organized crime."[20] Accordingly, the existence of organized crime in New Mexico, and Marchiondo's connection with it, was part of the defendant's truth defense. Sternlieb's testimony supported this defense. Sternlieb's affidavit alleged that Marchiondo secretly owned property in Albuquerque in a hidden partnership with Governor Apodaca and James Napoli, Sr., a leading organized crime figure from New York. It alleged further that Chief of Police Stover was familiar with these hidden interests, as evidenced by the fact that he drove Sternlieb and Napoli's son on a tour of these secretly owned businesses.

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18 *Id.*, p. 15. In that connection Mr. Romero showed the Affidavit to Stover on the evening of January 12, 1982 (see Exhibit Q, Stover's Deposition, (*Stover* case), pp. 299, and 305 and Exhibit P, Romero's Deposition, pp. 72-6) and Governor Apodaca was provided with a copy on March 26, 1982, through his wife, Clara Apodaca, (Exhibit P, Romero's Deposition, p. 87).

19 Exhibit P, Romero's Deposition, p. 28; Exhibit O, Letter from Romero to Clara Apodaca.

20 Exhibit Q, Stover's Deposition, pp. 107-13.

12. In his deposition, Stover specifically admitted that allegations of such an illicit partnership related to the issues in the *Marchiondo* case. Stover acknowledged that in his experience "as a . . . law enforcement officer," "[i]n determining whether or not Mr. Marchiondo was connected to organized crime figures," it was " . . . also relevant to understand the full extent of Mr. Marchiondo's connections to organized crime." In that regard, Mr. Stover admitted that "if it were true that Mr. Marchiondo had the chief of police of Albuquerque, New Mexico, picking up two organized crime figures . . ., that would certainly be a relevant fact in determining Mr. Marchiondo's connection and influence with organized crime."[21]

13. The universally recognized fact that organized crime cannot flourish without the tacit approval and complicity of local law enforcement officials underscores the relevance of the allegation that the Police Chief was knowledgeable about Marchiondo's organized crime connections and his hidden ownership of businesses in partnership with a leading organized crime figure. Mr. Lang recognized this fact at the time he first met Sternlieb.[22] In addition, it is a fact testified to in this case by retired FBI Agent James Doyle. Doyle, who had 28 years of experience in investigating organized crime and who was hired by Governor Apodaca to investigate Jerome Sternlieb in April, 1982, after his affidavit was unsealed,[23] is the former head of the Organized Crime Unit in the FBI's Albuquerque Field Office.

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21 Exhibit Q, Stover's Deposition, pp. 112-13.

22 Exhibit R, Lang's Deposition (*Stover* case), pp. 138-41, 173-74.

23 Exhibit S, Doyle's Deposition, pp. 7-13, 18-20.

14. The "complicity on the part of law enforcement for organized crime to survive"[24] was particularly relevant with reference to Marchiondo because, prior to meeting Sternlieb, the defendants had obtained solid evidence that it was the established *modus operandi* between Napoli and Marchiondo to include law enforcement officials in their schemes. This evidence consisted of a tape-recorded conversation between Napoli and Marchiondo at the Tombs Prison in New York City on March 15, 1975. This conversation was recorded on a bodywire worn by Ralph Grano, a corrections official who was working on an undercover investigation of Napoli. In that conversation Napoli suggested to Marchiondo and Marchiondo agreed, that the way to operate successfully in Las Vegas, Nevada is to get the involvement of law enforcement, in particular the sheriff in Las Vegas, Nevada. In that connection Napoli stated to Marchiondo:

> You first gotta make a contact with that guy that runs that town. That's the sheriff . . . right? Now, once you got him, now, listen, keep you nose clean, let me run it the way I want it. I don't wanna give ya so much a week. I wanna give you an interest in the joint. Nobody has to know. You got so many damn things going through here. Keep the fuckin coppers outta here. Let me invite my friends here.[25]

15. This same tape recording evidenced a relationship between Napoli and law enforcement in New Mexico. The Attorney General is the highest law enforcement officer in New Mexico. On the tape both Napoli and Marchiondo

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24 Exhibit R, Lang's Deposition, p. 138.

25 Exhibit T, tape-recorded conversation ("Tombs Tapes") of March 15, 1975 participated in by Grano, Marchiondo, and Napoli, p. 105.

discussed their friendship with former New Mexico Attorney General Boston Witt.[26] In fact, the defendants prior to meeting Sternlieb had in their possession a report of a surveillance conducted by the FBI and the Albuquerque Police Department of a meeting in New Mexico attended by Marchiondo, Napoli and Witt in August, 1972.[27] In that same tape-recorded conversation Marchiondo and Napoli also discussed business dealings they then had with former New Mexico Attorney General David Norvell. These business dealings were connected with George Dermksian (also known as "The Shoe"), a well known organized crime associate from Rhode Island.[28] At the time the Defendants first met Sternlieb, Dermksian had been convicted in New Mexico of multiple counts of bank fraud in connection with the business dealings which Marchiondo and Napoli had discussed on the tape.[29] When deposed in the *Marchiondo* case, Dermksian admitted meeting Norvell in 1975, in the presence of Marchiondo while Norvell was Attorney General.[30]

V. ON THE BASIS OF STERNLIEB'S AFFIDAVIT, HIS DEPOSITION WAS TAKEN

16. Less than two weeks after the affidavit was filed, on January 25 and 26, 1982, Sternlieb's deposition was taken in Washington, D.C. The defendants paid for Stover's trip to Washington, D.C. to attend the deposition so

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26 *Id.*, p. 23.

27 Exhibit U, Surveillance Report.

28 Exhibit T, Tombs Tapes, pp. 20-1.

29 Exhibit V, Dermksian Trial Verdicts on 6 counts.

30 Exhibit W, Dermksian's Deposition, pp. 9-11.

that he could confront Sternlieb and "have an opportunity to ask questions of him."[31] Prior to the deposition, Stover reported back to the defendants' attorneys that he could not find any appointment calendars, "nor did I have anything else to offer."[32] As reflected by the record, Sternlieb's deposition testimony basically tracked his affidavit. During the deposition Sternlieb was extensively cross-examined about Stover.[33]

VI. AT THE INITIATION OF FORMER GOVERNOR JERRY APODACA AND WITHOUT OPPOSITION FROM STOVER, JUDGE TRAUB ORDERED THE STERNLIEB AFFIDAVIT UNSEALED.

17. On April 12, 1982 Judge Traub notified the parties in the *Marchiondo* case by letter that he had "received an unsolicited call from Mr. James Toulouse advising that his client, former Governor Apodaca, intends to release to the press on Wednesday, April 14, 1982, a copy of the Sternlieb affidavit."[34] Apodaca, then a candidate for the Democratic nomination for the U.S. Senate, decided to release Sternlieb's affidavit purely for political reasons to take the offensive on these allegations before they became public.[35]

18. Immediately after receiving Judge Traub's letter the defendants in that case filed a motion to unseal the Sternlieb affidavit. That motion was heard before Judge

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31 Exhibit R, Lang's Deposition, p. 145.

32 Exhibit Q, Stover's Deposition, p. 363.

33 Exhibit X, Sternlieb's Deposition, pp. 173, 199-202, 206.

34 Exhibit Y, Judge Traub's Letter.

35 Exhibit Z, Toulouse's Deposition, pp. 26-7 and 31.

Traub on April 13, 1982, and was granted without opposition from Marchiondo or Apodaca.[36] Despite the fact that Stover had been specifically advised by Mr. Apodaca's attorney of this proceeding and that he had a right to appear and oppose the unsealing of the Affidavit, Stover for some unexplained reason chose not to attend.[37] Instead, he drafted an affidavit with the assistance of Mr. Romero, Marchiondo's attorney, denying Sternlieb's allegations.[38] At Stover's direction, Mr. Romero filed Stover's affidavit with the Court during the April 13th proceedings.[39] Attached to Stover's affidavit was a copy of Sternlieb's affidavit. Also, in the early afternoon of April 13, 1982, prior to the unsealing of the affidavit, Stover was interviewed by a reporter from KOAT-TV and discussed on camera Sternlieb's specific allegations concerning him.[40]

19. The news story about Sternlieb's affidavit and Stover's denials were carried that evening on KOB-TV, KOAT-TV and KGGM-TV.[41]

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36 Exhibit AA, Transcript of Proceedings, April 13, 1982.

37 Exhibit Z, Toulouse's Deposition, pp.34-8, and Exhibit AA, Transcript of Proceedings, April 13, 1982, p. 2.

38 Exhibit BB, Stover's Affidavit and Exhibit Q, Stover's Deposition, pp. 468-9, 471-4, 478-9, 496.

39 Exhibit AA, Transcript of Proceedings, April 13, 1982, pp. 12-13.

40 Exhibit CC, Conroy Chino's Deposition, pp. 10-11.

41 Exhibit DD, Ralph Green's Deposition, p. 5, and Ex. A; Exhibit EE, Andrew Hebenstreit's Deposition, p. 6 and Ex. A; and Exhibit FF, John McKean's Deposition, p. 6, and Ex. B, pp. 1-4.

VII. THE DAY AFTER JUDGE TRAUB UNSEALED THE STERNLIEB AFFIDAVIT, ITS CONTENTS WERE PUBLISHED IN THE ALBUQUERQUE JOURNAL.

20. The article which is the subject of this lawsuit, entitled, "Affidavit Says Apodaca Took Bribe," reported on the front page of the *Albuquerque Journal* the unsealing of the Sternlieb Affidavit and recounted its allegations and the rebuttal contained in Stover's affidavit. It was written by the reporter who regularly covers the Albuquerque Courthouse.[42] In fact, there was a strict policy imposed by Lang separating the defense of the *Marchiondo* lawsuit from the *Journal's* newspaper reporting functions. "I made the decision that we would keep complete separation between the circumstances involving the lawsuit, and any discovery thereof, and the editorial process."[43] Next to the text of that article were the photographs of Napoli, Sr. and Napoli, Jr., Stover and Apodaca. All four were the principal individuals singled out by Sternlieb in his affidavit. As Gerald Crawford, Editor of the *Albuquerque Journal,* and a defendant in this case, testified in his deposition, the fact of the Sternlieb affidavit in the *Marchiondo* case was a significant news story for several reasons. First, two of the individuals who were the subjects of Sternlieb's allegations were candidates for high public office in New Mexico. Apocada was a candidate for the Democratic nomination for the U.S. Senate, and Stover was the Republican candidate for Sheriff of Bernalillo County. That both candidates might be connected to or-

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42 Exhibit R, Lang's Deposition, p. 104 and Exhibit GG, Crawford's Deposition, pp. 14-15, 19 and 42.

43 Exhibit R, Lang's Deposition, pp. 105-6.

ganized crime was obviously of extreme public significance. Second, Apodaca had made Sternlieb's affidavit a highly charged news story by scheduling a press conference to release his allegations and by circulating petitions for a Grand Jury to be impanelled to investigate John Donohue, the *Albuquerque Journal* and Sternlieb with respect to Sternlieb's affidavit. Similarly, Stover had fueled the newsworthiness of the story by filing his own affidavit which denied that he had ever driven Sternlieb and Napoli, Jr. around Albuquerque and which attacked Sternlieb's credibility. Third, the fact that Apodaca, and perhaps Stover, wanted the Sternlieb affidavit released made the unsealing a newsworthy story.[44]

21. Crawford also testified that this news article "report[ed] . . . a court proceeding." Unlike an investigative piece, it did not seek to prove that anyone was connected to organized crime. As Crawford testified, with respect to court proceedings, the *Journal's* job "is to report as accurately and as balanced and fairly as possible . . . the information as it's presented."[45]

22. Crawford reviewed the story to satisfy himself that it "was a fair and objective report of what . . . [he] had been told had transpired," in the court proceeding. "[T]o make sure . . . [there was] a balanced story," he instructed a reporter to telephone Adopaca, who refused to comment, and a reporter to contact Stover, who chose not to elaborate beyond his affidavit.[46]

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44 Exhibit GG, Crawford's Deposition, pp. 25-9.

45 *Id.*, pp. 25-6.

46 *Id.*, pp. 26-7.

23. Crawford took pains to make the report of the Sternlieb Affidavit, as it emerged in the court proceedings, a model of fairness and balance. Each of Sternlieb's allegations was balanced with Stover's denials in his public affidavit. At the outset of the article is Stover's claim that "the affidavit is absolutely false" and his statement that "everything in his [Sternlieb's] affidavit concerning me was an outright lie."[47] Further into the article Stover is quoted as stating, "I did not know Jerome Sternlieb; I have never met him and everything in his affidavit was an outright lie." Stover's unqualified denial was again further emphasized toward the end of the article where Stover is quoted as stating that "he is neither a social nor business associate of Apodaca or Marchiondo, and I think the Sternlieb affidavit is a fabrication and a complete and outrageous lie." Crawford also wanted to be certain the article was "right up front about Sternlieb and the fact that he was a convicted felon."[48] At three points in the article it is reported that Sternlieb is a "convicted felon." This point is emphasized at the end of the article by the statement that Sternlieb "has been convicted of interstate mail fraud, wire fraud and the issuing of worthless checks."

24. Of the fifty-eight paragraphs in the April 14, 1982 article, all but six contain statements or information from the court record, including Sternlieb's affidavit, Stover's affidavit, Sternlieb's deposition and factual in-

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47 See *Journal* article, April 14, 1982, attached to the Complaint.

48 Exhibit GG, Crawford's Deposition, p. 32.

formation concerning the posture of the lawsuit. The first of these six paragraphs states that

> Apodaca said he would answer the accusations and other allegations in the affidavit today with substantial evidence.

This quote was elicited at the initiation of Mr. Crawford.

25. There are four paragraphs which quote Mr. Lang in response to the statements in Stover's affidavit. Stover states in his affidavit that he "offered to take a lie detector test or any other kind of truth test, but the *Journal* refused his offer."[49] Mr. Lang was quoted to provide the reader with an accurate picture of Mr. Stover's dealings with the *Journal*. In that connection, the statements of Mr. Lang make it clear that the *Journal* did not stop Stover from taking a lie detector test, that Stover was asked by the *Journal* to provide substantial evidence to disprove Sternlieb's allegations[50] and that Stover had attended Sternlieb's deposition at the expense of the Journal, a fact which Stover conveniently omitted from his affidavit. Stover, in his deposition, had either acknowledged or not contested the truth of any of these statements by Lang.[51]

26. As Stover conceded in his deposition, his affidavit also included a misrepresentation regarding answers given to questions asked of Jerome Sternlieb at his deposition.[52] Stover asserted in his affidavit that Sternlieb

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49 Exhibit BB, Stover's Affidavit, p. 2, paras. 5-6.

50 Indeed, Stover testified that Lang had "implored" him for such evidence. (Exhibit Q, Stover's Dep., pp. 336-340, 369.)

51 Exhibit Q, Stover's Deposition, p. 339.

52 *Id.*, p. 488.

had picked out his picture at a meeting at which only Donohue and Sternlieb were present.[53] Stover now admits —and Sternlieb's deposition testimony clearly establishes —that Stover's picture was picked out at the December 18, 1982, meeting during which Sternlieb's affidavit was taken.[54] This meeting was attended by Eric Lanphere, an attorney for the Albuquerque Journal, Martha Hill, secretary to Jim Dines, and John Donohue. Mr. Donohue's statement in the April 14th article corrects Stover's admittedly untrue statement regarding that meeting.

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We hereby certify that a copy of the foregoing pleading was hand delivered to opposing counsel of record this 25th day of February, 1985.

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.
By /s/William S. Dixon

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53 Exhibit BB, Stover's Affidavit, p. 5, para. 13.

54 Exhibit Q, Stover's Deposition, pp. 487-9.